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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91187847
Party	Plaintiff The Susan G. Komen Breast Cancer Foundation, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THE SUSAN G. KOMEN BREAST
CANCER FOUNDATION, INC.

Opposer,

v.

Opposition No. 91187847

CHRISTINE MACHLEIT and
MATILDA BEELER

Applicant

MOTION FOR SANCTIONS IN THE FORM OF A JUDGMENT SUSTAINING THE OPPOSITION

Pursuant to 37 C.F.R. § 2.120(g)(1), The Susan G. Komen Breast Cancer Foundation, Inc., d/b/a Susan G. Komen for the Cure ("Komen"), Opposer in the above-referenced opposition proceeding, hereby moves the Board to enter sanctions in the form of judgment against Applicants, Christine Machleit and Matilda Beeler (collectively, "Applicants"), for failure to comply with the Trademark Trial and Appeal Board's order dated October 22, 2009. *See* TTAB Order, attached to the Declaration of Howard S. Hogan ("Hogan Decl.") as Ex. A.

BACKGROUND

The procedural history of the opposition at issue is as follows:

On December 3, 2008, Komen filed an Opposition against Application Serial No. 77/136,451 filed by Applicants. Applicants filed their answer on January 10, 2009. As a result, Applicants' initial disclosures were due on *March 13, 2009.*

Komen served its First Set of Interrogatories and First Requests for Productions on Applicants on August 10, 2009 (collectively, the "First Requests"),[1] making the responses from Applicants due on *September 14, 2009*. Komen's first set of discovery requests to Applicants were returned to its then-counsel on September 15, 2009 by the U.S. Postal Service as "Attempted, Not Known." Hogan Decl. ¶ 3, Ex. B. The address Komen used for the requests was the address on file with the PTO, and Applicants had not changed their address with the PTO or notified Komen of any address change. On September 15, 2009, Komen's then-counsel sent another letter to Applicants at their last known address. Hogan Decl. Ex. C.

As of September 22, 2009, Komen still had not received *either* Applicants' initial disclosures *or* its responses to Komen's First Requests.

On September 22, 2009, Komen filed a motion to compel discovery and initial disclosures. Applicants did not file a brief in response to Komen's motion, but Applicants mailed their initial disclosures to Komen two days later on September 24, 2009. However, Komen did not receive—nor has it received as of the filing of this motion—Applicants' discovery responses to Komen's First Requests. Hogan Decl. ¶ 8.

On October 22, 2009, the Board granted Komen's motion to compel discovery and ordered Applicants to serve upon Komen "full and complete answers to all requests for interrogatories and all requests for documents and things, without objection (except for

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[1] Because Applicants failed to respond to Komen's First Requests for Admissions, which were also served on August 10, 2009, those admission requests are deemed admitted under Fed. R. Civ. P. 36(a) and are not the subject of this motion.

objections based on privilege)." Hogan Decl. Ex. A at p.3.[2] The Board explicitly put the parties on notice that if Applicants did not serve their discovery responses (as well as a privilege log, if applicable) by November 22, 2009, the Board would "entertain a motion for sanctions in the form of entry of judgment sustaining the opposition. See Trademark Rule 2.120(g)(1)." Hogan Decl. Ex. A at p.4.

On or around October 29, 2009, Applicants communicated with the Board regarding its October 22, 2009 order and filed a change of correspondence address, Hogan Decl. Ex. D. Using the telephone number listed on Applicant's change of correspondence form, counsel for Komen called Applicants and left a message requesting that Applicants to return his call in order to discuss the opposition proceeding. Hogan Decl. ¶ 7. As of the filing of this motion, Applicants have not returned counsel for Komen's call. More importantly, as of the filing of this motion, ***Komen has not received a single response to any of its First Requests***. Hogan Decl. ¶ 8. Accordingly, and pursuant to the Board's invitation, Komen respectfully moves the Board for an order providing sanctions against Applicants in the form of an entry of judgment sustaining the opposition.

ARGUMENT

It is well-established that if a party fails to comply with an order of the Board compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Federal Rule of Civil Procedure 37(b)(2), including entry of judgment. *See, e.g., Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848 (TTAB 2000). More particularly, the Board has stated that "[t]he law is clear that if a party fails to comply with

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[2] The Board also ordered Applicants to serve their initial disclosures. That portion of the order was mooted by Applicants' service of their initial disclosures on September 24, 2009.

an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2), *including entry of judgment.*" *MHW, Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 U.S.P.Q.2d 1477, 1478 (TTAB 2000) (emphasis added).

Applicants' decision to represent themselves *pro se* does not excuse them from the need to comply with the Board's order. Strict compliance with the Board's orders, the Trademark Rules of Practice, and, where applicable, the Federal Rules of Civil Procedure "is expected of all parties before the Board, whether or not they are represented by counsel." *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 U.S.P.Q.2d 1212, 1216 n.2 (TTAB 2006).

The Board's order, moreover, is clear. Applicants had "**thirty days**" from entry of the Board's October 22, 2009 order to serve their discovery responses or else risk entry of a judgment sustaining Komen's opposition. Hogan Decl. Ex. A at p. 3. And there is no argument that Applicants were not on notice of the October 22, 2009 order, because they contacted the Board to ask about it. The order itself provided clear guidance that Applicants would face "sanctions in the form of entry of judgment sustaining the opposition" if Applicants did not provide appropriate responses to Komen's First Requests. *Id.* at 4. Further, Applicants have not reached out to Komen to discuss these issues, let alone to return Komen's attempt to engage in communication regarding the opposition.

Applicants, therefore, chose not to comply with the Board's order. Given Applicants' willful disregard of the Board's rules and order, as well as Applicants' failure to respond to Komen's effort to communicate regarding this matter, the Board should enter judgment against Applicants sustaining the opposition.

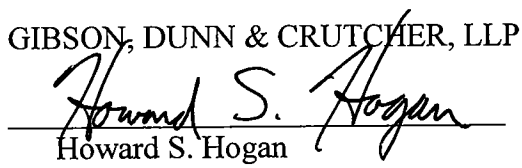
CONCLUSION

For the foregoing reasons, Komen respectfully requests that the Board enter an order assessing sanctions against Applicants in the form of entry of judgment sustaining the opposition.

Dated: December 1, 2009

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP



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Reference no. 93096-00001

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009, a copy of the foregoing **MOTION FOR SANCTIONS IN THE FORM OF A JUDGMENT SUSTAINING THE OPPOSITION** is being deposited with the United States Postal Service as first-class mail, postage pre-paid, in an envelope addressed to:

Christine Machleit
19931 Heartwood Drive
Perris, CA 92570

Dace A. Caldwell